(1)

SHDKT PROCEEDINGS AND ORDERS DATE: [07/06/94]

CASE NBR: [93108040] CFH STATUS: [DECIDED]
SHORT TITLE: [McFarland, Frank B.]
VERSUS [Scott, Dir., TX DCJ] DATE DOCKETED: [021794]
*** CAPITAL CASE -- No date of execution set *** PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Feb 17 1994	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Feb 25 1994	D	Motion of petitioner to consolidate case with No. 93-6497, McFarland v. Collins filed.
4	Feb 28 1994		DISTRIBUTED. March 4, 1994 (Page 14)
5	Mar 7 1994		Motion of petitioner to consolidate case with No. 93-6497, McFarland v. Collins DENIED.
8	Jun 6 1994		Brief of respondent Wayne Scott, Director in opposition filed.
10	Jun 9 1994		REDISTRIBUTED. June 24, 1994 (Page 7)
12	Jun 27 1994		REDISTRIBUTED. June 30, 1994 (Page 1)
14	Jun 30 1994		Petition DENIED. (Detached opinion.) Justice Blackmun dissenting: Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in Callins v. Collins, 510

PREVIOUS 1 1 EXIT

Last page of docket

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14	Jun 30 1994		Petition DENIED. (Detached opinion.) Justice Blackmun dissenting: Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in Callins v. Collins, 510 U.S. ___, ___ (1994), I would grant certiorari and vacate the death sentence in this case.

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(1A)

93-8040

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANK BASIL McFARLAND,

Petitioner,

v.

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* Mandy Welch
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Texas Resource Center
3223 Smith St., Ste. 215
Houston, Texas 77006
713-522-5917

* Counsel of record

28 pp

QUESTIONS PRESENTED

1. In view of both equitable principles governing habeas corpus and Congress' creation of a mandatory right to counsel in 21 U.S.C. § 848(q)(4)(B), did the district court err by applying the traditional Barefoot standard governing stays of execution to Petitioner, a death-sentenced habeas petitioner who filed a skeletal habeas petition solely to invoke the district court's jurisdiction to grant a stay in order to appoint counsel?

2. (a) Did the Court of Appeals err by dismissing Petitioner's appeal as moot?

   (b) Even if Petitioner's appeal is otherwise moot, is the larger issue raised on appeal nevertheless justiciable because it is "capable of repetition yet evading review"?

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IN THE SUPREME COURT
OF THE UNITED STATES

No. _____

FRANK BASIL McFARLAND

Petitioner,

-v-

JAMES A. COLLINS,
Director, Texas Department
of Criminal Justice,
Institutional Division,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, **FRANK BASIL McFARLAND,** respectfully requests that the Court grant Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Petitioner also requests that this case be consolidated with McFarland v. Collins, No. 93-6497 (pending on writ of certiorari).

CITATION TO OPINION BELOW

The United States Court of Appeals for the Fifth Circuit dismissed as moot Petitioner's appeal from the order of the federal district court refusing to stay Petitioner's execution and -- implicitly -- refusing to appoint counsel. See McFarland v. Collins, 8 F.3d 256 (5th Cir. Nov. 19, 1993). That opinion is attached hereto as **Appendix A.** A copy of the district court's order is attached as **Appendix B.**

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254. Jurisdiction in the district court existed under 28 U.S.C. §§ 1331, 1366, 1651(a), 2241, 2251, & 2254. In the Court of Appeals, jurisdiction was invoked pursuant to 28 U.S.C. §§ 1291(a) & 2253.

STATUTORY PROVISIONS INVOLVED

The issue in the case concerns two federal statutes: The habeas corpus statute affording federal courts the authority to stay the execution of a state court judgment of conviction and sentence in a capital case, 28 U.S.C. §2251, and the provision in the Criminal Justice Act requiring the appointment of federal habeas counsel, 21 U.S.C. §848(q)(4)(B).

STATEMENT OF THE CASE

I. Procedural and Factual Background

This case involves the same parties and is closely related to McFarland v. Collins, No. 93-6497 ["McFarland I"], which is scheduled for oral argument before this Court on March 29, 1994. The issue in McFarland I is whether a death-sentenced prisoner must file a document denominated as a habeas corpus "petition" before a federal district court has any authority to issue a stay of execution so that counsel may be appointed pursuant to 21 U.S.C. § 848(q)(4)(B). This case raises the issue of whether an admittedly perfunctory habeas "petition," which was prepared without the meaningful assistance of counsel and accompanied by a motion for appointment of counsel and motion for leave to file an amended petition, should be subject to the Barefoot standard governing stays of execution.[1] The procedural history of McFarland I is set forth in Petitioner's Brief filed in that case. Rather than repeat that herein, Petitioner will instead focus on the procedural events occurring after the district court and court of appeals denied his *pro se* motion for stay of execution and appointment of counsel. See McFarland v. Collins, 7 F.3d 47 (5th Cir. Oct. 26, 1993), cert. granted, 126 L.Ed 2d 446 (1993).

During the afternoon prior to Petitioner's scheduled execution -- shortly before the Fifth Circuit denied Petitioner's appeal in McFarland I -- a federal magistrate in the Northern District of Texas contacted a local Fort Worth attorney, Danny D. Burns, and

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[1] See Barefoot v. Estelle, 463 U.S. 880 (1983).

asked him whether he would accept appointment in Petitioner's case. As further recounted in Petitioner's Brief in McFarland v. Collins, No. 93-6497:

> Later, district court personnel told Mr. Burns that the court did not have jurisdiction to appoint him but that the court might grant a stay and appoint him if he were to file a document entitled a "petition for writ of habeas corpus" and agree to represent the petitioner. Concluding that the risk of filing such a perfunctory petition ... was outweighed by the risk that no stay at all would issue, Mr. Burns complied.[2]

McFarland v. Collins, Petitioner's Brief, at p.14 n.10, No. 93-6497 (pending on writ of certiorari). The "petition," prepared in the space if a few hours, merely raised one issue by adapting portions of the brief that had been filed by Mr. McFarland's court-appointed attorney on direct appeal. Along with the "petition," Petitioner filed a motion for stay of execution and motion for leave to file an amended petition. The State of Texas did not oppose Petitioner's motion for stay.

Unexpectedly, a few hours after the perfunctory habeas corpus "petition" was filed, the district court denied a stay of execution. The court did not deny or dismiss the petition itself, however. See McFarland v. Collins, No. 4:93-CV-723-A, unpublished slip op. (W.D. Tex. Oct. 26, 1993). But the court did hold that application of this Court's standard for stays, see Barefoot v. Estelle, 463 U.S. 880 (1983), required "the presence of substantial

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[2] Cf. Gosch v. Collins, 1993 U.S. App. LEXIS 29086 (5th Cir. Sept. 16, 1993) (cert. pending) The procedural history of Gosch -- and its relevance to Mr. McFarland's case -- is discussed in McFarland v. Collins, No. 93-6497, Petitioner's Brief, at 6-714 n.10.

grounds upon which relief might be granted." McFarland, slip op., at 2. The court held that the admittedly perfunctory "petition" offered no such grounds. See id. In a collateral order, the district court also denied Petitioner's motion for leave to file an amended petition.

Petitioner, by that point assisted by undersigned counsel from the Texas Resource Center, as well as Danny Burns,[3] immediately appealed the district court's orders to the court of appeals.[4] A divided Fifth Circuit issued a stay at approximately

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[3] The pleadings filed in the court of appeals included a "statement of counsel," which informed the court that Mr. Burns objected to the district court's refusal to appoint him after a federal magistrate had promised such an appointment would occur (along with a stay) if a perfunctory "petition" were filed. Mr. Burns also stated that he "represented" Petitioner on appeal only for the limited purpose of vindicating Petitioner's right to counsel. Likewise, counsel from the Resource Center stated that they were "representing" Petitioner only in order to vindicate his right to counsel. See Application for Certificate of Probable Cause and Stay of Execution, at 2. Mr. Burns, who was never appointed under 21 U.S.C. § 848(q)(4)(B), has since ceased his *pro bono* representation of Petitioner.

[4] The appeal raised numerous claims, including:

> (i) Mr. McFarland Is Entitled To A Certificate of Probable Cause and a Stay of Execution from this Court.
>
> (ii) The District Court, Which Unquestionably Possessed Jurisdiction, Erred by Failing to Grant a Stay of Execution. In So Doing, the District Court Violated 21 U.S.C. § 848(q)(4)(B) and Petitioner's Constitutional Right to Habeas Counsel.
>
> (iii) By refusing to permit Petitioner to amend his petition, the District Court violated FED. R. CIV. PRO. 15(a).

Application for Certificate of Probable Cause and Appointment of Counsel, at 3.

12:00 EST, noting that the State had not opposed a stay. McFarland v. Collins, 8 F.3d 258 (5th Cir. 1993).

Two days later, Mr. Burns voluntarily dismissed the perfunctory habeas corpus "petition" pursuant to FED. R. CIV. PRO. 41(a). See McFarland v. Collins, Notice of Dismissal of Petition for Writ of Habeas Corpus, No. 4:93-CV-723-A (filed Oct. 28, 1993). Mr. Burns explained that the "petition" was being dismissed because:

> As this Court is well aware, that "petition" was wholly inadequate by any standard of attorney competence and was only filed in view of the exigent circumstances, i.e., to prevent the execution of Petitioner before he, through the meaningful assistance of habeas counsel, could have the opportunity to file a genuine habeas corpus petition.
>
> Because both the Fifth Circuit and United States Supreme Court have entered stays of execution, the reason for filing the perfunctory "petition" in this Court no longer exists. By proceeding on the pending petition, Mr. McFarland risks being deprived of a meaningful opportunity to litigate all meritorious challenges to his conviction and death sentence not raised in the petition under Rule 9(b). Thus, Petitioner voluntarily dismisses his petition without prejudice, as provided for in Rule 41(a).

Petitioner's temporary counsel from the Texas Resource Center shortly thereafter wrote a letter brief to the court of appeals explaining why the "petition" was being dismissed:

> Once stays were entered by this Court and the United States Supreme Court, however, Petitioner believed that a voluntary dismissal of his petition was necessary because failure to do so could irreparably prejudice Petitioner's rights. In a recent Texas capital habeas case, a federal district court denied a stay and ruled on the merits of a perfunctory "petition" filed for the identical reasons that the "petition" in the instant case was filed. See Gosch v. Collins, No. SA-93-CA-731 (W.D. Tex. September 15, 1993), aff'd, Gosch v. Collins, ___

F.3d ___ (5th Cir. September 16, 1993), cert. pending (petition filed September 16, 1993).

Letter from Mandy Welch to Honorable Charles R. Fulbruge, III, Clerk of the United States Court of Appeals for the Fifth Circuit, November 1, 1993. The letter further explained that a similar ruling by the district court in this case would have placed Mr. McFarland in a successive habeas posture, thus subjecting him to the abuse of the writ doctrine, even though, because of his indigency, he has never been meaningfully represented by counsel in the post-conviction stage. Finally, the letter brief contended that the pending appeal was not moot because of Petitioner's voluntary dismissal of the perfunctory "petition. See id.

Rejecting that argument, the Fifth Circuit dismissed the appeal and lifted its stay as moot. McFarland v. Collins, 8 F.3d 256 (5th Cir. 1993). The court reasoned that:

> Petitioner is no longer seeking any habeas relief. Any decision by this Court whether the dismissed habeas petition did or did not show substantial grounds on which relief could be granted would be purely advisory. The dismissal of the habeas [petition] rendered the question moot. We are unpersuaded by the suggestion that Petitioner's claimed violation of his right to meaningful assistance of counsel by the denial of the stay remains justiciable because it is "capable of repetition yet evading review." ... [N]ow that Petitioner has counsel, and now that his execution has been delayed by both a stay granted by this Court and a stay granted by the Supreme Court in a related case, counsel has a continuing opportunity to review McFarland's case. Petitioner now has both counsel and a stay. We can grant him no further relief in this appeal. Accordingly, the appeal is dismissed as moot; [the] stay [is] lifted.

Id. at 257.

II. How the Issues Were Raised and Decided Below

Petitioner filed a habeas corpus petition (albeit a perfunctory one), a motion for leave to file an amended petition, and a motion for stay of execution and appointment of counsel pursuant to 21 U.S.C. § 848(q)(4)(B) in the district court on October 26, 1993. The motion for stay and motion for leave to file an amended petition were expressly denied in written orders issued on that same date. The district court refused to act on Petitioner's motion for appointment of counsel, thus effectively denying it under the circumstances of the case.[5] The district court did not rule on Petitioner's habeas corpus petition itself. Petitioner filed an appeal to the United States Court of Appeals for the Fifth Circuit, which contended that the district court erred in denying a stay and appointment of counsel. The court of appeals held that the stay issue was moot because Petitioner had obtained a stay from the court previously, see McFarland v. Collins, 8 F.3d 258 (5th Cir. 1993), and that this Court had also entered in a stay in McFarland's related case, see McFarland v. Collins, ___ U.S. ___. No. 93-6497 (pending on writ of certiorari). The court further reasoned that the specific issue of whether the district court's denial of a stay violated Petitioner's right to counsel was moot because "Petitioner [now] has counsel" and counsel has "a continuing opportunity to review Mr. McFarland's case."

[5] That is, because the district court denied a stay of Petitioner's imminent execution, the court also effectively denied Petitioner's motion for appointment of counsel because an execution would have obviously rendered Petitioner's statutory right to counsel meaningless.

McFarland, 8 F.3d at 257. The court further held that "[t]he motion for appointment [of counsel] filed in this matter was not ruled on by the district court, so there is no action to review." Id. at 257 n.1.

REASONS FOR GRANTING THE WRIT

I. IN VIEW OF BOTH EQUITABLE PRINCIPLES GOVERNING HABEAS CORPUS AND CONGRESS' CREATION OF A MANDATORY RIGHT TO HABEAS COUNSEL, THE DISTRICT COURT ERRED IN APPLYING THE BAREFOOT STANDARD GOVERNING STAYS OF EXECUTION TO PETITIONER'S CASE.

A. The Barefoot standard is inappropriate under the circumstances of this case in view of 21 U.S.C. § 848(q)(4)(B).

In Barefoot v. Estelle, 463 U.S. 880 (1983), this Court set forth the standard governing stays of execution issued by lower federal courts in capital habeas corpus appeals. Among other things, this Court held that a federal habeas petitioner must make "'a substantial showing of the denial of [a] federal right'" in order to obtain a stay. Id. at 893. (citations omitted). The Court went on to define the nature of such a showing:

> [P]etitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further."

Id. at 893 n.4.

The district court's reliance on the Barefoot standard in this case, and the Fifth Circuit's reliance on that standard in a case presenting virtually identical circumstances,[6] was misplaced.

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[6] See Gosch v. Collins, 1993 U.S. App. LEXIS 29086 (5th Cir. Sept. 16, 1993) (cert. pending) (denial of stay and certificate of probable cause). The Gosch decision is discussed above. Although the Fifth Circuit entered a stay of execution in this case (which it has since vacated), the court presumably did not overrule Gosch. Indeed, the court of appeals, over a vigorous dissent from Judge Jones, made it clear that a stay of execution was entered only because of the late hour of the appeal and the fact that the State did not oppose a stay. See McFarland v. Collins, 8 F.3d 258 (5th Cir. 1993).

Simply put, a habeas petitioner such as Mr. McFarland -- who filed a perfunctory habeas "petition" solely to satisfy the district court's prior holding that it lacked jurisdiction to stay Petitioner's execution and appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B)[7] -- should not be subject to a standard that presupposes that the petition was prepared by competent counsel. A stay is necessary for the very reason that appointed counsel needs a reasonable amount of time to prepare a meaningful habeas pleading, which may only be done after thorough legal and factual research.[8]. In McCleskey, the Court effectively restricted state court defendants to a single federal habeas appeal in the vast majority of cases.[9] Barefoot's standard should only be applied *after* counsel has had an opportunity to prepare such a meaningful

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[7] The district court's jurisdictional holding was, of course, affirmed in McFarland v. Collins, 7 F.3d 47 (5th Cir. 1993), cert. granted, McFarland v. Collins, No. 93-6497 (cert. granted Nov. 29, 1993).

[8] As another federal habeas court has observed regarding the role of habeas counsel:

> There is no dispute that as a result of [McCleskey v. Zant, 111 S. Ct. 1454 (1991)],

it is now "reasonably necessary" for [federal habeas] counsel [appointed under this statute] to investigate and present all claims in the first [federal habeas] petition. McCleskey made clear that attorneys must raise all claims, not merely those claims known to the petitioner at the time of filing [a habeas petition], but also those claims that a reasonable investigation would have revealed. *Faced with this obligation, an attorney must review the record, conduct a preliminary factual investigation, and ensure that all claims for relief have been uncovered and evaluated.*

Coleman v. Vasquez, 771 F. Supp. 300, 302 (N.D. Cal. 1991) (emphasis added).

pleading.

In the instant case, under the clear command of 21 U.S.C. § 848(q)(4)(B), the district court had little if any discretion about whether to stay Petitioner's imminent execution and appoint *permanent* counsel who can actually represent Petitioner.[10] The plain language of that statute unequivocally *required* the district court to appoint post-conviction counsel who could undertake genuine representation of Mr. McFarland's case. See id. ("In any post conviction proceeding under section 2254 . . . of Title 28, seeking to vacate or set aside a death sentence, any defendant who is . . . financially unable to obtain adequate [legal] representation . . . or other reasonably necessary services *shall be entitled* to the appointment of one or more attorneys . . . . ") (emphasis added). The mandate of § 848(q)(4)(B) can be effectuated only if a district court stays a capital habeas petitioner's execution for a reasonable time so that counsel can have a real opportunity to prepare a meaningful habeas corpus petition.

B. Equitable principles required a stay of execution under the circumstances of this case.

The district court's denial of a stay is also inconsistent with the larger equities present in this case. See Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (habeas corpus has "traditionally been regarded as governed by equitable principles"). A first-time

[10] Undersigned counsel continues to represent Petitioner solely for the limited purpose of vindicating his right to counsel.

capital habeas petitioner does not merit such summary treatment, particularly when he has not actually been represented by an attorney. No attorney has carefully reviewed the record to identify potentially meritorious constitutional claims. Nor has any federal or state habeas court reviewed the record. This was Petitioner's *first* habeas corpus petition of any type, state or federal. His direct appeal certiorari petition was denied by this Court in June of 1993. The Texas habeas courts denied Petitioner a simple stay to enable *pro bono* counsel[11] to be obtained. Such counsel is necessary to exhaust the potential federal constitutional claims not raised on direct appeal to the Texas Court of Criminal Appeals; of course, exhaustion of state court remedies is a prerequisite to raising such claims in federal court.

Even critics of the pace of capital habeas corpus proceedings have never suggested that such expedited, "sham" procedures are appropriate. See, e.g., Judge Edith H. Jones, *Death Penalty Procedures: A Proposal for Reform*, 53 TEX. B. J. 850, 851-52 (1990). The district court's order effectively denied Petitioner's statutory right to counsel in his federal habeas proceedings.

The federal courts have had a long history of assuring that capital defendants are afforded careful review in both state and federal court, before the State carries out the penalty of death. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932). The instant case, albeit in the context of habeas corpus rather than at trial,

[11] The State of Texas does not compensate counsel for representing of death row inmates who file post-conviction habeas corpus petitions in state court.

strongly resembles the facade of legal representation of a capital defendant that this Court condemned in Powell over six decades ago. See Powell, 287 U.S. at 56, 58 ("[T]his action of the trial judge in respect of appointment of counsel was little more than an . . . gesture . . . . The [capital] defendants . . . were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.").

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE LARGER ISSUE RAISED ON THIS APPEAL IS MOOT.

As discussed above, the court of appeals held that the issue of whether Petitioner was entitled to a stay of execution so that counsel could appointed pursuant to 21 U.S.C. § 848(q)(4)(B) was moot. The court gave two reasons for its holding: (i) Petitioner had already received two stays, one from the Fifth Circuit and one from this Court and, furthermore, Petitioner also had counsel, who had sufficient time to prepare a meaningful habeas petition; and (ii) Petitioner had voluntarily dismissed his first habeas petition. See McFarland v. Collins, 8 F.3d 256, 257 (5th Cir. 1993).[12] The court also rejected Petitioner's argument that his appeal fell within this Court's "capable of repetition yet evading review" exception to the mootness doctrine. As the Fifth Circuit reasoned, "[t]he present scenario is not capable of repetition, because Rule 41(a) will not allow successive voluntary dismissals without prejudice." Id. at 257.

The Fifth Circuit's mootness analysis is mistaken, both in its understanding of Petitioner's arguments and in the result. Admittedly, as the court stated, Petitioner's originally scheduled execution was stayed on October 26, 1993 (and remains stayed) in McFarland I, and the underlying habeas corpus petition that was

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[12] The court purported not to reach the specific issue of whether the district court had erred in refusing to appoint counsel because, as the court put it, "the motion for appointment filed in this matter was not ruled upon by the district court, so there is no action to review." Id. at 257 n.1. As explained above, the court was mistaken in so holding because the district court had effectively denied that motion.

filed in this action along with the motion for stay and for the appointment of counsel has been dismissed. However, as explained below, neither of those facts renders the larger issue appealed to the Fifth Circuit non-justiciable. Furthermore, Petitioner disputes the court of appeals' assertion that "Petitioner now has ... counsel ...," McFarland, 8 F.3d at 257, at least insofar as the court was implying that Petitioner has permanent appointed habeas counsel as envisioned by 21 U.S.C. § 848(q)(4)(B). Petitioner has never been appointed counsel by any federal or state court. Rather, as explained in the "statement of counsel" included in Petitioner's Fifth Circuit pleadings, undersigned counsel simply represents Petitioner for the purpose of vindicating his right counsel.

The larger stay issue is not moot, notwithstanding both the entry of a stay and the voluntary dismissal of the underlying habeas petition, because the issue "is capable of repetition yet evading review." Renne v. Geary, 111 S. Ct. 2331, 2338 (1991). At the time that Petitioner requested relief from the Fifth Circuit, the appeal involved a "live controversy": namely, whether the district court erred by denying a stay and refusing to appoint counsel. And the issues raised in that controversy are capable of repetition but evading review. Thus, the mootness exception is applicable. See Renne, 111 S. Ct. at 2338.

Petitioner's Rule 41(a) voluntary dismissal[13] did not render the

[13] As explained above, the voluntary dismissal was done solely to prevent the district court from ruling on the merits of the perfunctory "petition," thus prematurely placing Petitioner

appeal from the denial of the stay moot because *the larger stay issue*, as opposed to the habeas petition dismissal, is still capable of repetition yet evading review. The Fifth Circuit mistakenly assumed that the Rule 41(a) dismissal was what Petitioner referred to when he stated that the larger issue raised on appeal was capable of repetition. Rather, Petitioner was referring to the scenario in which he would again be forced to file a perfunctory habeas "petition" in order to vest the district court with jurisdiction to stay his execution in order to appoint counsel pursuant to 21 U.S.C. § 848(q)(4)(B). As noted, to date, such counsel has never been appointed pursuant to § 848. This scenario thus could arise again. See Lane v. Williams, 455 U.S. 624, 633-34 (1982) ("The [capable-of-repetition exception] is applicable only when there is 'a reasonable expectation that the same complaining party would be subject to the same action again.'") (citation omitted).[14] Likewise, the stay that is presently in effect could, of course, could vacated if this Court denies Petitioner relief in his related appeal. Thus, the present stay does not render the issue incapable of repetition.

The larger issue is capable of evading review, if it were to arise again, because Petitioner could be executed before the issue

in an abuse-of-the-writ posture. Cf. Gosch v. Collins, supra.

[14] Indeed, if this Court were ultimately to hold in McFarland v. Collins, No. 93-6497 (pending on writ of certiorari), that the district court possessed no jurisdiction to stay Petitioner's execution (under either 28 U.S.C. § 1651(a) or 28 U.S.C. § 2251) in order to appoint counsel (under 21 U.S.C. § 848) until a habeas corpus "petition" was filed, this scenario certainly could recur.

is decided by this Court. Of course, there is no assurance that any court, including this Court, would stay his execution if he were to file another perfunctory habeas corpus "petition." Petitioner's death would undoubtedly render the issue moot. Therefore, Petitioner's appeal falls within the well-established exception to the mootness doctrine.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari, reverse the judgment of the Court of Appeals, and remand with instructions that counsel be appointed pursuant to 21 U.S.C. § 848(q)(4)(B) and that a stay be entered should the Texas courts schedule Petitioner's execution prematurely. Petitioner suggests that this Court could appropriately consolidate this cause with Petitioner's pending appeal in McFarland v. Collins, No. 93-6497. If this Court ultimately rules against Petitioner in that case on the ground that the district court possessed no jurisdiction to stay Petitioner's execution in order to appoint counsel pursuant to 21 U.S.C. § 848, this case would present the Court with the opportunity to address the larger right-to-counsel issue without any jurisdictional complications, since a petition was pending at the time that the issues were raised.

Respectfully submitted,

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* Counsel of record

CERTIFICATE OF SERVICE

I, Mandy Welch, a member of the Bar of this Court, hereby certify that true and correct copies of this Petition for Writ of Certiorari, Petitioner's Motion for Leave to Proceed In Forma Pauperis have been sent by first-class mail to:

Enforcement Division
Office of the Attorney General
209 West 14th Street
Price Daniel, Sr. Building
8th Floor
Austin, TX 78701,

this 17th day of February, 1994.

Mandy Welch

Mandy Welch

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FRANK BASIL MCFARLAND

VS. Petitioner,

JAMES A. COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent.

NO. 4:93-CV-723-A

O R D E R

Came on to be considered in the above styled and numbered action the motion of petitioner, Frank Basil McFarland, ("McFarland") for stay of execution. The court concludes that the motion for stay should be denied.

On November 15, 1989, McFarland was convicted of capital murder and sentenced to death in the Criminal District Court Number Three of Tarrant County, Texas, the Honorable Don Leonard presiding. On September 23, 1992, McFarland's conviction was affirmed by the Texas Court of Criminal Appeals. McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992). On June 6, 1993, McFarland's petition for writ of certiorari to the United States Supreme Court was denied. McFarland was represented by counsel each of the above mentioned stages. On August 16, 1993, Judge Ward entered an order scheduling McFarland's execution for November 23, 1993. On June 7, 1993, Judge Drago, sitting for Judge Leonard, ordered McFarland's execution date changed to

Petition for writ of habeas corpus, 3. The petition briefly touches on the alleged deprivation of confrontation and denial of due process, but does not contain any discussion of alleged ineffective assistance of counsel.[1]

The court has conducted an independent review of the September 23, 1992, opinion of the Texas Court of Criminal Appeals on McFarland's direct appeal of his conviction and sentence[2]. McFarland raised on appeal the issues of (i) the trial court's failure to make findings of fact and conclusions of law in ruling on the admissibility of the testimony in question ("first issue") and (ii) failure to hear testimony from McFarland's expert ("second issue"). He did not raise the issue now presented that he was denied effective cross examination and due process. Thus, McFarland did not begin to exhaust his state court remedies as to that issue. Therefore, that issue cannot provide basis for granting habeas corpus relief. Picard v. Connor, 404 U.S. 270, 275-76 (1971); Thomas v. Collins, 919 F.2d 333, 334 (5th Cir. 1990).

The first issue does not raise a claim of constitutional magnitude. As to the second issue, McFarland's petition does not

[1]Based on the very facts recited by McFarland in his petition, a claim of ineffective assistance would not stand on the ground alleged. See Strickland v. Washington, 466 U.S. 668, 687 (1984). In any event, McFarland did not raise this issue on direct appeal nor did he exhaust available state habeas corpus remedies in this regard. Therefore, the court is foreclosed from cosidering the issue.

[2]See McFarland v. State, 845 S.W.2d 824 (Tex. Crim. App. 1992), cert. denied, 113 S. Ct. 2937 (1993).

suggest any legal harm that he has suffered as a result of the state's failure to hear testimony from his expert.

Moreover, as to all theories urged in the petition, the court notes that the trial court found that "the hypnosis neither rendered the post hypnotic memory untrustworthy nor substantially impaired the ability of the opponent to test the witness' recall by cross examination." S.F. vol. 30, 575. Section 2254(d) provides that the fact finding of the state court "shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear" that certain conditions enumerated therein exist. 28 U.S.C. §2254(d). McFarland has not made any allegation that would suggest that the trial court's findings should not be accepted by the court.

Furthermore, the Fifth Circuit noted that "even if McFarland's pleadings are characterized as a federal habeas petition, the district court would be obliged to dismiss it for failure to exhaust the claims." McFarland v. Collins, No. 93-1954 , slip op. at 3, n.1.

For the reasons stated above, McFarland has not satisfied the standard expressed by the United States Supreme Court in Barefoot. Therefore,

The court ORDERS that the motion of McFarland for stay of execution be, and is hereby, denied.

SIGNED October 26, 1993.

JOHN McBRYDE
United States District Judge

ORIGINAL

No. 93-8040

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

FRANK BASIL McFARLAND,
Petitioner,

v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In view of both equitable principles governing habeas corpus and Congress' creation of a mandatory right to counsel in 21 U.S.C. § 848(q)(4)(B), did the district court err by applying the traditional *Barefoot* standard governing stays of execution to McFarland, a death-sentenced habeas petitioner who filed a skeletal habeas petition solely to invoke the district court's jurisdiction to grant a stay in order to appoint counsel.

2. (a) Did the court of appeals err by dismissing McFarland's appeal as moot.

   (b) Even if McFarland's appeal is otherwise moot, is the larger issue raised on appeal nevertheless justifiable because it is "capable of repetition yet evading review"?

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No. 93-8040

IN THE
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FRANK BASIL McFARLAND,
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v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
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Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Respondent Wayne Scott, Director, Texas Department of Criminal Justice, Institutional Division,[1] by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dismissing the appeal as moot is attached to the petition as Appendix A. *McFarland v. Collins*, 8 F.3d 47 (5th Cir. 1993). The opinion of the United States District Court for the Northern District of Texas, Fort Worth Division, is attached to the petition as Appendix B.

[1] For clarity, the petitioner is referred to as "McFarland" and the respondent as "the Director".

STATEMENT OF JURISDICTION

McFarland seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254. Nonetheless, because the courts below did not grant McFarland a certificate of probable cause to appeal but rather dismissed his appeal as moot, this case never was "in" the court of appeals for purposes of appeal under § 1254. As set forth *infra*, there is no jurisdiction pursuant to the All Writs Act, codified at 28 U.S.C. § 1651.

CONSTITUTIONAL PROVISIONS INVOLVED

McFarland bases his claims upon 28 U.S.C. § 2251 and 21 U.S.C. § 848 (q) (4) (B).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The Director has lawful custody of McFarland pursuant to a judgment and sentence of Criminal Court Number 3, Tarrant County, Texas. McFarland was indicted on March 23, 1988 in Cause Number 0336837D for the capital murder of Terry Hokanson in the course of committing aggravated sexual assault. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon Supp. 1991). McFarland entered a plea of "not guilty" to the indictment. Trial on the merits commenced on October 26, 1989, and on November 13, 1989, the jury returned a verdict of guilty as charged in the indictment. Following a separate hearing on punishment, the same jury affirmatively answered two special issues submitted to it pursuant to Article 37.071(b) of the Texas Code of Criminal Procedure. Thereafter, the trial court sentenced McFarland to death by lethal injection.

McFarland's case was automatically appealed to the Texas Court of Criminal Appeals, which affirmed his conviction and sentence on September 23, 1992. *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992). Rehearing was denied on December 9, 1992. The Texas Appellate Practice and Education Resource Center (hereinafter "the Center") withdrew records of McFarland's trial and appeal from the Court of Criminal Appeals on January 19, 1993, and returned them on January 25, 1993. JA 98.

On March 9, 1993, Isaiah Gant of Nashville, Tennessee, an attorney recruited by the Center, filed a petition for writ of certiorari, which was denied on June 6, 1993. *McFarland v. Texas*, 113 S.Ct. 2937 (1993). More than two months later, on August 16, 1993, the state trial judge, Judge Leonard, entered an order scheduling McFarland's execution for September 23, 1993. JA 3-5. By letter dated September 19, 1993, Eden Harrington of the Center asked Judge Leonard to withdraw McFarland's scheduled execution date because it would take "at least 120 days" to locate new counsel for McFarland, and recruited or appointed counsel should be allowed at least an additional 120 days to prepare the state habeas application. JA 6-10. The following day, the trial court ordered the modification of McFarland's execution date to October 27, 1993. JA 12.

Judge Leonard received a second letter and proposed order from the Center, dated October 16, 1993. In the letter, the Center stated that it still had not secured counsel for McFarland and again asked the court to withdraw the execution date. JA 16-19. On October 21, 1993, with the assistance of the Center, McFarland filed a *pro se* application for stay of execution and motion for appointment of counsel in the Court of Criminal Appeals. JA 21-23. Neither the stay application nor the motion for appointment of counsel was presented to the trial court. JA 89-90. The Court of Criminal Appeals denied the application for stay and the motion on Friday, October 22, 1993. JA 40. McFarland challenged the denial of the stay and appointment of counsel in a petition for writ of certiorari, which was denied on November 29, 1993. *McFarland v. Texas*, 114 S.Ct. 575 (1993).

The same day, with the assistance of the Center, McFarland filed *pro se* a motion for stay of execution and for appointment of counsel in the United States District Court for the Northern District of Texas, Fort Worth Division, docketed as No. 4:93-CV-714-A. JA 41-45. No federal habeas corpus petition was filed. On October 25, 1993, the district court denied a stay of execution because McFarland had not invoked its jurisdiction by

filing a federal habeas petition. JA 76-78. On October 26th, the district court struck from the record McFarland's application for a certificate of probable cause to appeal (CPC), because the action did not represent an habeas proceeding. JA 79-80. The United States Court of Appeals for the Fifth Circuit denied CPC and a stay at approximately 6 p.m. the same day. JA 85-88, *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993). The Court then granted McFarland's subsequent application for stay of execution, *McFarland v. Collins*, 114 S.Ct. 374 (1994), and , on November 29, 1993, granted the petition for writ of certiorari limited to question 2 presented by the petition. *McFarland v. Collins*, 114 S.Ct. 544 (1994).

At approximately 6 p.m. on October 26th, McFarland filed a motion for appointment of counsel and stay of execution and a federal petition for writ of habeas corpus, No. 4:93-CV-723-A, in which he raised one ground for relief. In an order that addressed the merits of McFarland's claim, the district court denied a stay of execution. McFarland's subsequent motion for leave to file an amended habeas petition did not include any additional grounds for relief and was denied by the district court at approximately 8:30 p.m. CPC was denied by the district court at 10:17 p.m. A motion for stay of execution was thereafter granted by the Fifth Circuit at approximately 11:50 p.m. On October 28th, McFarland filed in the district court a notice of dismissal pursuant to Federal Rule of Civil Procedure 41(a). McFarland's appeal subsequently was dismissed as moot and the stay lifted. *McFarland v. Collins*, 8 F.3d 256 (5th Cir. 1993).

B. Statement of Facts

The Court of Criminal Appeals found the following facts:

> Viewed in the light most favorable to the verdict, the evidence at trial established the following facts. On the afternoon of February 1, 1988, the victim went to work at a bar in Arlington. Appellant and a friend of his, Michael Ryan Wilson, were also at the club on this day. At some point in the afternoon, the two men had a drink sent over to the victim. Later, a waitress introduced the victim to the

two men. Appellant, Wilson, the victim, and a waitress made plans to go to another bar together later that evening, although the waitress canceled her part of the arrangement.

Around 7:00 p.m. or 8:00 p.m. that evening, the victim went home to change and eat dinner before going out. Several employees of the second bar remember seeing a woman, who fit the description of the victim, arrive alone between 8:00 p.m. and 9:00 p.m. They also recalled her leaving shortly thereafter with two men. Her car was found in the parking lot the next morning.

Approximately 10:00 p.m. or 11:00 p.m. that evening, three teenage boys were walking by a public park when they heard a scream. One stood on a nearby bench to look for the police and saw a car driving away. As the boys continued walking, they noticed someone stumbling in a "kind of drunk manner." As they got closer to the figure, they realized the figure was a woman. When they reached her, they noticed that she had blood on her face. One of the boys asked if she needed help, to which she replied that she did. The other boy immediately ran to the nearest house to call for help. The victim told the boys that she had been sexually assaulted and stabbed.

While the one boy was away, a police officer happened upon the scene. The boys told the officer that the victim said that she had been sexually assaulted and stabbed. As the officer approached the victim, he could see that she had blood on her face, jacket, and shirt, and her hand was cut to the bone. The officer tried to question the victim as much as possible. The victim told him that "[t]hey raped and stabbed me." The officer elicited further information that the two assailants were white men and that the victim had met them at the club where she worked. The officer could not later remember the name of the club, but he was subsequently placed under hypnosis, at which time that information was elicited. When the paramedics arrived, the victim also told them that she had been sexually assaulted and stabbed. The victim died about 3:00 a.m.

A search of the area where the victim was found turned up her purse, shoes, watch, and one earring in a pool of blood at the top of the hill. Additionally, a five hundred foot trail of blood led from where the victim's belongings were found to where she had been discovered. An autopsy

revealed that the victim had been stabbed by at least two different types of knives and knife-like weapons. The examination also revealed evidence of sexual intercourse, but was inconclusive as to whether the victim had been sexually assaulted.

At trial, Wilson's girlfriend, Rachael Revill, testified that on the night in question, appellant and Wilson arrived at her apartment. They had left the apartment together in appellant's car earlier that evening and were not returning together. Revill noticed that Wilson's pants appeared to be stained with blood and appellant appeared to have a gash on his hand. After Wilson showered, changed, and gathered his blood-stained clothing, the two men again left. Wilson returned about fifteen minutes later without appellant. Revill said Wilson was surrounded by a "burning odor." Wilson later told his girlfriend that he had burned his clothes because they had blood on them. He also explained that he and appellant had "had to get rid of a girl" because she knew too much about their drug business. Wilson insisted that appellant had actually killed the victim.

At a later time, appellant again picked Wilson up from Revill's apartment and they went to the club where the victim had worked on the day she was killed. Appellant asked a waitress if any detectives had asked anything about him or Wilson. The waitress observed scratch marks down appellant's cheek. Subsequently, Wilson contacted an acquaintance of his and appellant's, Mark Noblett. He told Noblett that he and appellant had been to a club with the victim and that later, appellant sexually assaulted and stabbed the victim. Wilson also told Noblett that he was afraid of appellant and wanted Noblett to approach the police on his behalf. The two men agreed to meet the next day, but Wilson never showed.

On March 11, 1988, Wilson was found dead in Weatherford. Four days later, Revill contacted the police and told them of Wilson's confession to her on the night of the victim's murder. Warrants were then issued to obtain blood, saliva, and hair samples from appellant and to impound and search his automobile. The search of appellant's vehicle uncovered hairs which proved to be microscopically similar to those found in a rabbit coat of the type that the victim was wearing the night she was killed. A scarf was also discovered on which was found a pubic hair

> microscopically similar to the victim's. Finally, the police recovered an earring which was not distinguishable from the earring found at the scene of the murder. A DNA analysis of the semen recovered from the victim's body and found on her clothes did not eliminate appellant as a donor, although it did conclusively establish that, if Wilson was a donor, he was not the sole donor.

McFarland v. State, 845 S.W.2d 824, 828-300 (Tex. Crim. App. 1992).

ARGUMENT

I.

THE ISSUE PRESENTED BY McFARLAND IN THIS PETITION WILL BE RESOLVED BY THE COURT IN *McFARLAND V. COLLINS*.

This case is controlled by and should be held pending the Court's disposition of the issue before it in *McFarland*. McFarland argues here that a perfunctory petition, filed to assure the district court's jurisdiction to enter a stay and appoint counsel under 21 U.S.C. § 848 (q), should not be subject to the *Barefoot v. Estelle*, 463 U.S. 880 (1983), standard for stays of executions, which requires the petitioner to make a substantial showing of the denial of a federal right. *Id.* at 893. Although 21 U.S.C. § 848 (q) was not identified in the issue upon which certiorari review was granted in *McFarland v. Collins*, 114 S.Ct. 544 (1994),[2] both the briefing and argument before the Court make it clear that the issue raised in the instant petition is subsumed in the issue before the Court in that case. If the Court decides that the *Barefoot* standard is applicable to death-sentenced inmates for whom counsel has not yet been appointed pursuant to 848 (q) and who have not yet filed

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[2] Certiorari review was granted to decide the following issue:

> Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251 or 28 U.S.C. § 1651 (a), in order to appoint counsel for an indigent *pro se* death row inmate who has not yet filed a habeas corpus petition but who has expressed an intention to file a petition once counsel is obtained?

a habeas petition, then the *Barefoot* standard will surely be applicable to a death sentenced inmate who has filed a petition identifying grounds for relief. Conversely, if the Court decides that the *Barefoot* standard is inapplicable under the circumstance before the Court in *McFarland*, it should correspondingly be inapplicable where a perfunctory petition is filed only to endow the district court with jurisdiction to appoint counsel pursuant to 848 (q) and to stay the execution to allow for the filing of a federal habeas petition. Further, the circumstances delineated by McFarland in this case are not capable of repetition because his rights under the circumstances will be determined by the Court's resolution of *McFarland*.

For the reasons briefed and argued on behalf of the Director in *McFarland*, the district court correctly applied the *Barefoot* standard to deny McFarland a stay based on his second habeas petition, and, following McFarland's voluntary dismissal of the district court action, the Court of Appeals correctly dismissed the appeal of the denial of a stay and appointment of counsel as moot.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that McFarland's petition for writ of certiorari be denied.

Respectfully submitted,

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June 6, 1994

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Frank Basil McFarland v. Wayne Scott*, No. 93-8040

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

Margaret Portman Griffey

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MPG/skw
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No. 93-8040

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1993

FRANK BASIL McFARLAND,
Petitioner,

v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 6th day of June, 1994, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Mandy Welch and Brent Newton, Texas Resource Center, 3223 Smith St., Suite 215, Houston, Texas, 77006. All parties required to be served have been served. I am a member of the Bar of this Court.

Margaret Portman Griffey

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ATTORNEY FOR RESPONDENT

SUPREME COURT OF THE UNITED STATES

FRANK BASIL McFARLAND *v.* WAYNE SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 93-8040. Decided June 30, 1994

The petition for a writ of certiorari is denied.

JUSTICE BLACKMUN, dissenting.

Today in *McFarland* v. *Scott*, *ante*, at ___, this Court addressed the right to qualified legal counsel guaranteed to all capital defendants in federal habeas corpus proceedings. See 21 U. S. C. §848(q)(4)(B). More often than not, however, it is in the proceedings antecedent to federal habeas corpus—the capital trial, and to a lesser extent state postconviction proceedings—that a capital defendant's case is won or lost. Frequently the legal counsel available to capital defendants at these critical stages is woefully inadequate. I therefore write to address the crisis in trial and state postconviction legal representation for capital defendants that forms the backdrop to the federal right to counsel afforded by §848(q)(4)(B).

Without question, "the principal failings of the capital punishment review process today are the inadequacy and inadequate compensation of counsel at trial and the unavailability of counsel in state post-conviction proceedings." Robbins, Toward a More Just and Effective System of Review in State Death Penalty Cases, Report of the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus, 40 Am. U. L. Rev. 1, 16 (1990) (ABA Report). The unique, bifurcated nature of capital trials and the special investigation into

a defendant's personal history and background that may be required, the complexity and fluidity of the law, and the high, emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials. Yet, the attorneys assigned to represent indigent capital defendants at times are less qualified than those appointed in ordinary criminal cases. See Green, Lethal Fiction: The Meaning of 'Counsel' in the Sixth Amendment, 78 Iowa L. Rev. 433, 434 (1993); Coyle, et al., Fatal Defense, 12 Nat'l L. J. 30, 44 (June 11, 1990) (Capital-defense attorneys in eight States were disbarred, suspended, or disciplined at rates 3 to 46 times higher than the general attorney-discipline rates).

Two factors contribute to the general unavailability of qualified attorneys to represent capital defendants. The absence of standards governing court-appointed capital-defense counsel means that unqualified lawyers often are appointed, and the absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense. Many States that regularly impose the death penalty have few, if any, standards governing the qualifications required of court-appointed capital-defense counsel. In 21 U. S. C. §§848(q)(5) and (6), Congress has required that attorneys appointed to represent capital defendants in federal habeas corpus proceedings must have five years of experience litigating before the relevant court and three years of felony experience. See *McFarland*, ___ U. S., at ___, n. 2. According to a 1990 survey by the National Law Journal, however, Florida, Georgia, Mississippi, Texas, and California have no binding statewide qualification criteria for capital-defense counsel. See Coyle, 12 Nat'l L. J., at 32. Capital-defense attorneys in Louisiana must have five years' experience practicing in some area of law, but are not required to have experience in capital defense or any form of criminal practice. *Ibid.*

In addition to the lack of standards, compensation for attorneys representing indigent capital defendants often is perversely low. Although a properly conducted capital

trial can involve hundreds of hours of investigation, preparation, and lengthy trial proceedings, many States severely limit the compensation paid for capital defense. Louisiana limits the compensation for court-appointed capital-defense counsel to $1,000 for *all* pretrial preparation and trial proceedings. Kentucky pays a maximum of $2,500 for the same services. Alabama limits reimbursement for out-of-court preparation in capital cases to a maximum of $1,000 each for the trial and penalty phases. Ala. Code §15–12–21 (a) (Supp. 1992); Op. Ala. Att'y Gen. No. 91–00206 (Mar. 21, 1991). See generally Klein, The Eleventh Commandment: Thou Shalt Not be Compelled to Render the Ineffective Assistance of Counsel, 68 Ind. L. J. 363, 364–375 (1993).

Court-awarded funds for the appointment of investigators and experts often are either unavailable, severely limited, or not provided by state courts. As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client's defense. A recent survey by the Mississippi Trial Lawyers' Association estimated that capital-defense attorneys in that State are compensated at an average rate of $11.75 per hour. See Coyle, 12 Nat'l L. J., at 32. Compensation rates of $5 per hour or less are not uncommon. Strasser, $1,000 Fee Cap Makes Death Row's 'Justice' A Bargain for the State, 12 Nat'l L. J. 33 (June 11, 1990).[1] The prospect that hours spent in trial

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[1]Recent improvements have been made, however. The Florida Supreme Court struck down the State's maximum fee of $3,500 as unconstitutional when applied in such a manner as to impinge on the right to effective counsel in capital cases. *White* v. *Board of County Comm'rs*, 537 So. 2d 1376 (Fla. 1989). The court found itself "hard pressed to find any capital case in which the circumstances would not warrant an award of attorneys' fees in excess of the [$3,500] fee cap." *Id.*, at 1378. South Carolina's Supreme Court

preparation or funds expended hiring psychiatrists or ballistics experts will be uncompensated unquestionably chills even a qualified attorney's zealous representation of his client.

The practical costs of such ad hoc systems of attorney selection and compensation are well documented. Capital defendants have been sentenced to death when represented by counsel who never bothered to read the state death penalty statute, *e.g.*, *State* v. *Smith*, 581 So. 2d 497 (Ala. Crim. App. 1990), slept through or otherwise were not present during trial, or failed to investigate or present any mitigating evidence at the penalty phase, *Mitchell* v. *Kemp*, 483 U. S. 1026 (1987) (Marshall, J., dissenting from denial of certiorari). Other indigent defendants have been represented by attorneys who had been admitted to the bar only six months before and never had conducted a criminal trial. *E.g.*, *Paradis* v. *Arave*, 954 F. 2d 1483, 1490–1491 (CA9 1992), vacated and remanded, ___ U. S. ___ (1993), relief denied, 20 F. 3d 950, 959 (1994). One Louisiana defendant was convicted of capital murder following a one-day trial and 20–minute penalty phase proceeding, in which his counsel stipulated to the defendant's age at the time of the crime and rested. *State* v. *Messiah*, 538 So. 2d 175, 187 (La. 1988), cert. denied, 493 U. S. 1063 (1990). When asked to cite the criminal cases he knew, one defense attorney who failed to challenge his client's racially unrepresentative jury pool, could name only two cases: *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and *Dred Scott* v. *Sandford*, 19 How. 393 (1857). See Bright,

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also refused, on Sixth Amendment grounds, to enforce the State's $10 and $15 per hour and $5,000 maximum compensation levels in capital cases. *Bailey* v. *State*, 424 S. E. 2d 503, 508 (S.C. 1992). The Oklahoma and Arkansas Supreme Courts recently struck down their States' respective compensation caps of $3,200 and $1,000 as unconstitutional takings when applied to capital cases. See *State* v. *Lynch*, 796 P. 2d 1150 (Okla. 1990); *Arnold* v. *Kemp*, 306 Ark. 294, 813 S. W. 2d 770 (1991).

Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L. J. 1835, 1839, and n. 32, citing Tr. of April 25–27, 1988 Hearing, at 231, *State* v. *Birt*, No. 2360 (Super. Ct. Jefferson Cty., Ga. 1988).

The consequences of such poor trial representation for the capital defendant, of course, can be lethal. Evidence not presented at trial cannot later be discovered and introduced; arguments and objections not advanced are forever waived. Nor is a capital defendant likely to be able to demonstrate that his legal counsel was ineffective, given the low standard for acceptable attorney conduct and the high showing of prejudice required under *Strickland* v. *Washington*, 466 U. S. 668 (1984). Ten years after the articulation of that standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than "a person who happens to be a lawyer." *Id.*, at 685.

The impotence of the *Strickland* standard is perhaps best evidenced in the cases in which ineffective assistance claims have been denied. John Young, for example, was represented in his capital trial by an attorney who was addicted to drugs and who a few weeks later was incarcerated on federal drug charges. The Court of Appeals for the Eleventh Circuit rejected Young's ineffective assistance of counsel claim on federal habeas, *Young* v. *Kemp*, 727 F. 2d 1489 (1984), and this Court denied review, 470 U. S. 1009 (1985). Young was executed in 1985. John Smith and his codefendant Rebecca Machetti were sentenced to death by juries selected under the same Georgia statute. Machetti's attorneys successfully challenged the statute under a recent Supreme Court decision, *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), winning Machetti a new trial and ultimately a life sentence. *Machetti* v. *Linahan*, 679 F. 2d 236 (CA11 1982). Smith's counsel was unaware of the Supreme Court decision, however, and failed similarly to object at trial.

Smith v. *Kemp*, 715 F. 2d 1459 (CA11 1983). Smith was executed in 1983.

Jesus Romero's attorney failed to present any evidence at the penalty phase and delivered a closing argument totalling 29 words. Although the attorney later was suspended on unrelated grounds, Romero's ineffective assistance claim was rejected by the Court of Appeals for the Fifth Circuit, *Romero* v. *Lynaugh*, 884 F. 2d 871, 875 (1989), and this Court denied certiorari, 494 U. S. 1012 (1990). Romero was executed in 1992. Larry Heath was represented on direct appeal by counsel who filed a 6–page brief before the Alabama Court of Criminal Appeals. The attorney failed to appear for oral argument before the Alabama Supreme Court and filed a brief in that court containing a 1-page argument and citing a single case. The Eleventh Circuit found no prejudice, *Heath* v. *Jones*, 941 F. 2d 1126, 1131 (1991), and this Court denied review, 502 U. S. ___ (1992). Heath was executed in Alabama in 1992.

James Messer, a mentally impaired capital defendant, was represented by an attorney who at the trial's guilt phase presented *no* defense, made no objections, and emphasized the horror of the capital crime in his closing statement. At the penalty phase, the attorney presented no evidence of mental impairment, failed to introduce other substantial mitigating evidence, and again repeatedly suggested in closing that death was the appropriate punishment. The Eleventh Circuit refused to grant relief, *Messer* v. *Kemp*, 760 F. 2d 1080 (1985) (Johnson, J., dissenting), and this Court denied certiorari, 474 U. S. 1088 (1986). Messer was executed in 1988. Even the attorney who could name only *Miranda* and *Dred Scott* twice has survived ineffective assistance challenges. See *Birt* v. *Montgomery*, 725 F. 2d 587, 596–601 (CA11) (en banc), cert. denied, 469 U. S. 874 (1984); *Williams* v. *State*, 258 Ga. 281, 368 S. E. 2d 742 (1988), cert. denied, 492 U. S. 925 (1989).[2] None of these cases inspires confidence that the adversarial system functioned properly or "that the trial can[] be relied on as having produced a just result." *Strickland*, 466 U. S., at 686. Yet, in none of these cases was counsel's assistance found to be ineffective.

Regardless of the quality of counsel, capital defendants constitutionally are entitled to have *some* "person who happens to be a lawyer . . . present at trial alongside the accused." *Id.*, at 685. The same cannot be said for state postconviction review. State habeas corpus proceedings are a vital link in the capital review process, not the least because all federal habeas claims first must be adequately raised in state court. This Court thus far has declined to hold that indigent capital defendants have a right to counsel at this level, based on the assumption that capital defendants generally can obtain volunteer or other counsel to represent them in these state proceedings. *Murray* v. *Giarratano*, 492 U. S. 1, 14 (1989) (KENNEDY, J., joined by O'CONNOR, J., concurring in judgment) (In "the case before us . . . no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings").

Though perhaps true for some jurisdictions, this assumption bears little resemblance to the realities confronting McFarland and other condemned inmates in Texas. A recent study of state postconviction capital representation in Texas sponsored by the American Bar Association (ABA) concluded that the capital-defense situation in that State is "desperate." The Spangenberg Group, A Study of Representation in Capital Cases in Texas, ii (March 1993). According to the Spangenberg

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[2]For further discussion of these and other examples of indigent capital defense representation, see, *e.g.*, Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L. J. 1835 (1994); ABA Report, at 65–70.

Group, "Texas has already reached the crisis stage in capital representation and . . . the problem is substantially worse than that faced by any other state with the death penalty." *Id.*, at i.

Texas has the second largest death row in the country, with approximately 375 inmates currently facing execution. Since 1976, Texas has executed approximately one third of all the defendants put to death in the United States, NAACP Legal Defense and Educational Fund, Inc., Death Row, U. S.A., 10 (Spring 1994), and the pace of executions in Texas is increasing. In June 1993, this Court denied certiorari in an unprecedented 29 capital cases from Texas, including McFarland's. During the ensuing period between June 1 and October 21, 1993, Texas scheduled 39 executions and actually executed 10 capital defendants. All told, the Lone Star State set more than 100 execution dates in 1993, at least eight of which were set within 45 days of the close of direct review.

Finding qualified defense counsel capable of meeting this demand might be formidable even if an adequate pool of attorneys and adequate funds were available. Capital defendants in Texas, however, have no statutory right to counsel in state postconviction proceedings, receive little benefit from the State's skeletal public defender service, and are not provided even discretionary court-appointed counsel. Although the Texas Code of Criminal Procedure, Arts. 11.07, 26.04, 26.05, gives state courts discretion to appoint and compensate counsel for state habeas corpus proceedings, "this is almost never done." Spangenberg Group, at vii. Funds for experts and other expenses also "are almost never approved." *Ibid.* Indeed, the ABA study found that "[p]resently no funds are allocated for payment of counsel or litigation expenses at the state habeas level." Spangenberg Group, at ii. Capital defendants in state postconviction proceedings must rely almost exclusively on volunteer private counsel—volunteers who are increasingly difficult to find. Texas thus has become "the only death penalty

state in which death-sentenced prisoners are not routinely represented in state postconviction proceedings." Brief for American Bar Association as *Amicus Curiae*, *McFarland* v. *Scott*, No. 93–6497, 3, and n. 9. The lack of attorney compensation and Texas' aggressive practice of "[d]ocket control by execution date," Jones, "Death Penalty Procedures: A Proposal for Reform, 53 Tex. Bar J. 850, 851 (1990), have left an estimated 75 capital defendants in Texas who currently are facing execution dates without any legal representation.

The right to qualified legal counsel in federal habeas corpus proceedings bestowed by §848(q)(4)(B) is triggered only after a capital defendant has completed his direct review and, generally, some form of state postconviction proceeding. The continuing importance of federal habeas corpus in correcting constitutional errors is well documented. Of the capital cases reviewed in federal habeas corpus proceedings between 1976 and 1991, nearly half (46%) were found to have constitutional error. Liebman, More than 'Slightly Retro:' The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in *Teague* v. *Lane*, 18 N.Y.U. Rev. L. & Soc. Change 537, 541, n. 15 (1990–1991). The total reversal rate of capital cases at all stages of review during the same time period was estimated at 60% or more. *Id.*, at 541, n. 15; see also *Murray* v. *Giarratano*, 492 U. S., at 23–24, and n. 13 (STEVENS, J., joined by Brennan, Marshall, and BLACKMUN, JJ., dissenting) (citing a federal habeas corpus success rate of 60% to 70% in capital cases, versus 0.25% to 7% in noncapital cases); *id.*, at 14 (KENNEDY, J., joined by O'CONNOR, J., concurring in judgment). This Court itself frequently has granted capital defendants relief in federal habeas corpus proceedings. See, *e.g.*, *Parker* v. *Dugger*, 498 U. S. 308 (1991); *Yates* v. *Evatt*, 500 U. S. ___ (1991); *Yates* v. *Aiken*, 484 U. S. 211 (1988); *Yates* v. *Aiken*, 474 U. S. 896 (1985); *Penry* v. *Lynaugh*, 492 U. S. 302 (1989); *Amadeo* v. *Zant*, 486 U. S. 214 (1988); *Maynard* v. *Cartwright*, 486 U. S. 356 (1988); *Johnson* v. *Mississippi*,

486 U. S. 578 (1988); *Hitchcock* v. *Dugger*, 481 U. S. 393 (198[illegible] *Ford* v. *Wainwright*, 477 U. S. 399 (1986).

Th[illegible] mere presence of "[s]uch a high incidence of uncorrected error" found in capital habeas corpus proceedings, *Murray* v. *Giarratano*, 492 U. S., at 24 (STEVENS, J., joined by Brennan, Marshall, and BLACKMUN, JJ., dissenting), testifies to the inadequacy of the legal representation afforded at the trial and state postconviction stages. Yet the barriers to relief in federal habeas corpus proceedings are high. Even the best lawyers cannot rectify a meritorious constitutional claim that has been procedurally defaulted or waived by prior inadequate counsel. The accumulating and often byzantine restrictions this Court has imposed on federal habeas corpus review, see, *e.g.*, *Herrera* v. *Collins*, 506 U. S. ___ (1993); *Sawyer* v. *Whitley*, 505 U. S. ___ (1992); *Keeney* v. *Tamayo-Reyes*, 504 U. S. ___ (1992); *Coleman* v. *Thompson*, 501 U. S. ___ (1991); *McCleskey* v. *Zant*, 499 U. S. ___ (1991); *Butler* v. *McKellar*, 494 U. S. 407 (1990); *Teague* v. *Lane*, 489 U. S. 288 (1989), make it even less likely that future capital defendants who receive qualified legal counsel in federal habeas actually will obtain relief. And it is the capital defendant who pays the price for the failings of counsel and this review process—generally with his life.

Our system of justice is adversarial and depends for its legitimacy on the fair and adequate representation of all parties at all levels of the judicial process. The trial is the main event in this system, where the prosecution and the defense do battle to reach a presumptively reliable result. When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing. And when this Court curtails federal oversight of state court proceedings, it does so in reliance on the proposition that justice has been done at the trial level. My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether

this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled. It is my hope and belief that this Nation soon will come to realize that capital punishment cannot morally or constitutionally be imposed. Until that time, however, we must have the courage to recognize the failings of our present system of capital representation and the conviction to do what is necessary to improve it.

Adhering to my belief that the death penalty cannot be imposed fairly within the constraints of our Constitution, *Callins* v. *Collins*, 510 U. S. ___ (1994) (BLACKMUN, J., dissenting), I would grant the petition for certiorari and vacate the death sentence.